

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DONALD STEVEN YAAG,

Petitioner,

v.

ROBERT LeGRAND, et al.,

Respondents.

Case No. 3:14-cv-00295-MMD-WGC

ORDER

This habeas matter comes before the Court on: (1) respondents' motion to dismiss (ECF No. 25); (2) petitioner's motion for leave to supplement the petition (ECF No. 32); (3) petitioner's third motion for appointment of counsel (ECF No. 35); and (4) petitioner's motion for judicial action on actual innocence claim (ECF No. 37).

I. MOTION FOR APPOINTMENT OF COUNSEL

The November 10, 2016, order granting petitioner's motion seeking discovery sets forth the background relevant to this order. (See ECF No. 39.)

Exhibit 4 in the record supplement filed on December 9, 2016, potentially corroborates petitioner's allegation that he was incarcerated in California at a time when the complaining witness testified that he committed the offenses charged in Counts 1 to 5. Petitioner was convicted on Count 4. As noted in the prior order, evidence tending to establish that petitioner could not have been in Nevada at the time of, at the very least, the offenses in Counts 1 to 5 further is potentially relevant to petitioner's arguments challenging the credibility of the witness' testimony regarding the remaining counts for which he stands convicted. (See ECF No. 39 at 12.) Petitioner, accordingly, potentially

1 may be able to overcome any untimeliness and/or procedural default of claims herein by
2 satisfying the actual-innocence standard in *Schlup v. Delo*, 513 U.S. 298 (1995).

3 The Court therefore finds that the interest of justice requires the appointment of
4 counsel, and petitioner's motion for same will be granted pursuant to the remaining
5 provisions of this order.

6 **II. REMAINING MOTIONS**

7 The remaining motions will be denied without prejudice in anticipation of the filing
8 of a counseled amended petition.

9 The denial of respondents' motion to dismiss is without prejudice to respondents'
10 assertion or reassertion of all defenses applicable to the claims in the counseled
11 amended petition.

12 The denial of petitioner's motion for leave to supplement the petition is without
13 prejudice to possible arguments seeking to establish relation back to any claims or
14 allegations asserted therein. The motion simply is denied without prejudice due to the
15 anticipated filing of a superseding counseled amended petition.

16 **III. ADDITIONAL MATTERS**

17 In its most recent order, the Court admonished petitioner regarding
18 noncompliance with Local Rule LR IC 6-1, which requires in pertinent part that parties
19 not include the names of minor children in filings. (See ECF No. 39 at 17-18.)

20 Respondents failed to redact the complaining witness' name from the exhibits
21 filed in response to that very same order.

22 The Court will direct the Clerk to file Exhibits 1 through 3 in ECF No. 40 under
23 seal as the most expedient manner of rectifying respondents' noncompliance with the
24 local rule.

25 The Court trusts that sterner measures will not be required to ensure that the
26 parties take all steps necessary to comply with the local rule. The Court regards
27 noncompliance with the local rule in this context to be an especially serious matter.

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1 **IV. CONCLUSION**

2 It is therefore ordered that petitioner's motion for appointment of counsel (ECF
3 No. 35) is granted. The counsel appointed will represent petitioner in all federal
4 proceedings related to this matter, including any appeals or *certiorari* proceedings,
5 unless allowed to withdraw.


6 It is further ordered that the Federal Public Defender will be provisionally
7 appointed as counsel and will have thirty (30) days to undertake direct representation of
8 petitioner or to indicate to the Court the office's inability to represent petitioner in these
9 proceedings. If the Federal Public Defender is unable to represent petitioner, the Court
10 then will appoint alternate counsel. A deadline for the filing of an amended petition
11 and/or seeking other relief will be set after counsel has entered an appearance. The
12 Court anticipates setting the deadline for approximately one hundred twenty (120) days
13 from entry of the formal order of appointment. Any deadline established and/or any
14 extension thereof will not signify any implied finding of a basis for tolling during the time
15 period established.

16 It is further ordered that all remaining motions (ECF Nos. 25, 32, and 37) are
17 denied without prejudice.

18 It is further ordered that the Clerk of Court seal Exhibits 1 through 3 in ECF No.
19 40.

20 The Clerk accordingly will send a copy of this order to the *pro se* petitioner, the
21 Nevada Attorney General, the Federal Public Defender, and the CJA Coordinator for
22 this division. The Clerk further will provide copies of all prior filings herein to the Federal
23 Public Defender in a manner consistent with the Clerk's current practice, such as
24 regeneration of notices of electronic filing.

25 DATED THIS 15th day of December 2016.

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28 _____
MIRANDA M. DU
UNITED STATES DISTRICT JUDGE